

DEPARTMENT OF INSURANCE

300 CAPITOL MALL
SACRAMENTO, CA 95814

**Attachment II
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December 12, 2001

TO: Life Insurers and Life Agents
FROM: HARRY W. LOW, California Insurance Commissioner
SUBJECT: **Living Trust Mills and Pretext Interviews**

The purposes of this Notice are to:

1. Inform insurers and production agents regarding the use of a marketing scheme known as a "living trust mill," and to address the responsibilities of both insurers and producers in assuring that the described or similar marketing practices are not used in the solicitation and sale of Insurance in California.
2. Address the provisions of the Insurance Information and Privacy Protection Act of the California Insurance Code, as they relate to the use of pretext interviews by insurers, producers and insurance-support organizations.

Living Trust Mills

Put simply, a living trust mill is an unlawful marketing scheme designed to accomplish the sale of annuities that is principally used in the solicitation of senior citizens. While the specifics of living trust mills may vary, they all share the common attributes of misrepresentation of identity and purpose. Each misrepresents the actual business of the sales representative and the true purpose of the solicitation. The initial approach to clients may be to solicit senior citizens at "seminars," purportedly designed to educate participants about the benefits of living trusts and other estate planning devices. The approach may be through mass mailing, telemarketing, door-to-door solicitation, or even while providing entertainment at senior related functions. Regardless of how clients are initially solicited, the sales presentations are basically the same. The representatives misrepresent themselves as experts in estate planning. They gain the trust and confidence of the client, and then misuse that trust to discover the extent of the client's assets under the pretext of determining whether the client can benefit from a living trust. Trust mills typically use both licensed and unlicensed representatives, and often operate in conjunction with attorneys or attorney reference services in order to give the operation the appearance of legitimacy. After the living trust and related estate planning documents have been sold, a representative, usually a licensed agent, again misrepresenting his or her identity and purpose, attempts to sell an annuity to the client as part of their estate planning program. Clients characteristically perceive the agent as their legal advisor or estate planner and not as an insurance agent.

In 1997, the People of the State of California, represented by the Attorney General and a number of district and city attorneys, sought civil penalties, restitution, and injunctive relief against Fremont Life Insurance Company and others, including a corporate licensed life agent¹ and several individual licensees, in an action alleging unfair business practices and false advertising under California Business and Professions Code sections 17200 and 17500. The specific allegations of the Complaint were that the insurer, the agents and others, operated a "living trust mill" in which the agents, posing as experts in estate planning, marketed an estate plan to senior citizens in the manner described above. It was alleged that the concealed, material purpose for an estate planning interview conducted by the agents was to obtain personal financial information from clients in anticipation of the sale of a Fremont Life Insurance Company annuity, and receipt of the commissions generated by the sale. Where clients agreed to purchase the estate plan, the agents prepared standardized trust documents, and delivered them to the purchasers for execution during subsequent appointments. Typically, the agents would solicit the clients for the purchase of the annuity during the delivery and execution process.

The lawsuit against the insurer proceeded to trial in Los Angeles Superior Court in early 1999; the production agents' having previously stipulated to a final judgment which included civil penalties and restitution. On October 27, 1999, the court filed its Statement of Decision in favor of the People and against Fremont Life Insurance Company. In making affirmative findings with regard to each of the above-recited allegations, the court made the following significant determinations:

- The insurer was involved in and responsible for the unauthorized practice of law by its agents in marketing the estate plans.
- The insurer was engaged in an unfair, fraudulent and deceptive business practice in the marketing of its annuities where, pursuant to training practices known to the insurer, its agents:
 - Misrepresented that they were advisors on matters of estate planning through the use of inter vivos trusts, rather than salespersons who had the ultimate goal of selling annuity policies to customers.
 - Misrepresented that the agency was an organization of senior citizens or an organization which functioned on behalf of senior citizens, rather than an insurance sales organization.
- The insurer was responsible for the acts of its agents, not only under the theory of agency, but that of ratification for accepting the substantial benefits of the unlawful acts of its salespersons.

The court's Statement of Decision and subsequent judgment provided injunctive relief, restitution to policyholders and civil penalties of approximately \$2.5 million dollars. While an appeal is currently pending regarding the amount of the award of civil penalties, the appeal is not material to the findings of the court addressed herein.

While this litigation was widely publicized, both within and outside the insurance industry, the Insurance Commissioner continues to receive and investigate complaints of similar activities, and to take action against those found responsible for unlawful practices. These continuing circumstances have necessitated the issuance of this Notice. The Commissioner, along with other state and local officials, is determined to stop these fraudulent practices by

pursuing all appropriate administrative, civil and criminal enforcement remedies necessary to the task.

Pretext Interviews

The activities described in this Notice, both with regard to the pending litigation and general discussion, are actionable under Business and Professions Code sections 17200 and 17500. As indicated above, established violations can result in injunctive relief, restitution and both civil and criminal penalties. As well, such violations are administratively actionable under the provisions of the Insurance Information and Privacy Protection Act,² and may result in orders to cease and desist, subsequent monetary penalties and the suspension or revocation of certificates of authority and production agent licenses.

Insurance Code section 791.03 provides that "[n]o insurance institution, agent or insurance support-organization³ shall use or authorize the use of pretext interviews to obtain information in connection with an insurance transaction." Insurance Code section 790.02(u) defines "Pretext interview" as "an interview whereby a person, in an attempt to obtain information about a natural person, performs one or more of the following acts: (1) Pretends to be someone he or she is not. (2) Pretends to represent a person he or she is not in fact representing. (3) Misrepresents the true purpose of the interview. (4) Refuses to identify himself or herself upon request."

Acts (1) through (3) are inherent in the operation of a trust mill, and insurers and agents found to have used or authorized the use of these practices will be the subject of appropriate sanctions under the Insurance Information and Privacy Protection Act.

While neither the Business and Professions Code's Unfair Competition Law or the Insurance Information and Privacy Protection Act are limited in their application to living trust mills, the prevalence of such schemes in current marketing practices is cause for the Insurance Commissioner to request agents and insurers to conduct a focused identification and review of each marketing program in which they are involved, for the purpose of assessing their compliance with the above cited statutes. Particular attention should be given to any program for annuity sales in which the insurer or agent states or infers that they possess particular expertise in the areas of law, finance or financial planning. Offending programs should be corrected immediately, and remedial action should be taken. Remediation should include allowing purchasers that were unlawfully solicited to rescind their contracts.

Thank you for your consideration of this matter.

1. Alliance For Mature Americans Insurance Services, Inc.

2. Insurance Code section 791 et seq.

3. Insurance-support organizations are persons engaged in the business of assembling or collecting information about natural persons for the primary purpose of providing the information to an insurance institution or agent for insurance transactions. Insurance institutions include insurers holding certificates of authority, and agents include production agents' licenses pursuant to the provision of the California Insurance Code.